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THE ORIGIN AND GROWTH OF THE JURISPRUDENCE OF THE TWO VIRGINIAS.

PRESIDENT'S ANNUAL ADDRESS.

Gentlemen of the West Virginia Bar Association:

I have selected a subject which I trust will prove to be of interest and value to you. Many able lawyers in addresses before State Bar Associations have given attention to the subject, but not in such a manner as to present it in concrete form to the attention of the members of the legal profession within or without the State. I have, therefore, found it no small undertaking to put together the numerous references of historians and law writers covering the various phases of this important subject from its origin, and compress the same into the space usually allotted to an address before a Bar Association for such a discussion. I claim no special originality for what I shall herein offer, because the work I have done is in the line of a compiler only. The books I have found most helpful are "Bruce's Institutional History of Virginia in the Seventeenth Century," "Minor's Institutes," Vol. IV, 3d Edition, "Henning's Statutes," and the records of some of the early counties, or shires, of the Jamestown Colony which have materially aided me in my investigations.

The Cavaliers who formed a settlement at Jamestown in 1607 brought with them from England its system of laws, social customs and religious doctrines. Their aim was to maintain, as far as possible, not only the spirit, but also the letter of the English laws. The edict of the King issued to them, after the formation of the Colony, was to adhere as closely as they could "to the common law of England, and the equity thereof." As early as 1631, the oath which each colonial justice of the peace and judge was required to take commanded him "to do justice as near as may be to the English laws;" and we find Governor Berkeley, in 1662, declaring that justice was administered in

Virginia according to "the laws of England as far as we are able to understand them." He stated further that "all things of fact were tried by jury," and Magna Carta, the Petition of Right, and the Writ of Habeas Corpus also formed a part of the fundamental ordinances of the Virginia Colony.

Bruce, in his Virginia History of the Seventeenth Century, states that inasmuch as all the acts of the General Assembly had to receive the King's assent before they finally became laws, that assent made valid even those acts which were repugnant to the ordinances of England; therefore, the conclusive test was whether this assent had or had not been given. When, in the commissions of the Governors and the judges of the county courts, it was declared that they were to perform the duties of their respective offices in harmony with the "known laws of England and the laws and customs of Virginia," it was simply intended, so far as the laws as distinguished from the customs of Virginia were involved, to enforce only such enactments as had received the royal approval; and if that approval had been received it was a ground of no concern whether or not these enactments were in conflict with the English statutory or common law. The continual usage, however, up to 1684, was according to the laws and usages of Virginia, and this is established by all the decisions in the several courts both civil and criminal whereof there are many precedents.[1] The successive Kings seem to have respected strictly even mere custom unless supposed to be inimical to the royal prerogative; in which case, custom was overridden.

Six different courts constituted the judicial system, viz: The Magistrate's Court, the Parish Court, the County Court, the General Court, the General Assembly, and the Court of Admiralty. Also a Court of Chancery was maintained for a few years but was abolished by the English Government as unnecessary. Bruce further states that there was no place to be found in which justice more speedy or at a smaller charge was to be obtained than in Virginia at this time; and what was true of this period was also true of every other after the meeting of the first General Assembly in 1619, the time from which the

1. Letters of William Fitzhugh, June 10, 1684.

colony's history as a free and practically self-governing community really dates. The lowest and least important of these courts was the Magistrate's Court, the highest and most important, was the General Court. In 1642, there was passed an act of assembly authorizing the justices of the peace to try every case involving an amount not exceeding twenty shillings, or two hundred pounds of tobacco. The object this law had in view was twofold: first, to avoid the expense which, by a suit in the monthly court, would have been entailed on both parties by having to go a great distance and to lose much valuable time attending its sessions; and, secondly, to discourage unnecessary litigations in that court, where a dispute over twenty shillings would have absorbed as many hours and required the presence of as many costly witnesses as a dispute over a thousand pounds.

The Magistrate's Court was not confined exclusively to civil controversies, but also had jurisdiction over criminal acts. As early as 1656, a justice of the peace possessed the power to arrest and bind over any inveterate law-breaker.

But one Parish Court was in operation in the Colony, which was created by an act of the Assembly in 1656, for Henrico and Charles City Counties only. It had concurrent jurisdiction with the County Courts and was established for the convenience of the residents of the two counties named, but it was discontinued before the end of the century as it was found to be unnecessary.

The most important of these early courts to the people at large was the Monthly or County Court. It was created by an act of the General Assembly in 1618, and was the people's own court, as it was for nearly three hundred years thereafter, for the adjustment of petty legal disputes between citizens. The establishment of this legal tribunal, therefore, was in strict conformity with one of the most important rights guaranteed to all Englishmen by Magna Carta at Runnymede. The members of the court were chosen from "the most able, honest and judicious citizens" of the different counties. In the beginning, the court did not exceed four members, but in 1628 the number was increased to eight and still later to ten justices of the peace. The office of a justice was looked upon as being so purely honorable that, following the Eng-

lish precedent, it carried no salary in the strict sense of the term; nor were there any perquisites growing out of the position approaching in importance those which made the office of councillor so valuable from a pecuniary point of view. The only remuneration at any time bestowed on the judges of the county bench by an act of the General Assembly was the thirty pounds of tobacco ordered under the provisions of a statute passed in 1681, to be paid towards the maintenance of these judges by every litigant in their respective courts who should fail to win his suit.[2]

These County Courts were extremely dignified tribunals which insisted on maintaining strict decorum on the part of litigants and bystanders who attended them. They convened early in the mornings and continued their sessions until late in the afternoons and frequently into the nights. The justices were a plain county folk, who showed no respect for limited hours of toil and deliberation.

When these courts were established in 1619, their jurisdiction was confined to small or petty matters; but in the act of 1623 their powers were extended to controversies not exceeding the value of one hundred pounds of tobacco, it being the common or basic currency of the realm. Five years later the limitation of their jurisdiction by a second act of the Assembly, expressly prohibited them from deciding any question that placed either life or limb in jeopardy.[3] They were empowered to enter final judgment in all suits not exceeding five pounds sterling in value. They were also directed to inquire into petty crimes, to insure the safety of the people and to maintain peace.

The General Assembly in 1634 adopted ten pounds sterling as the general amount of the court's jurisdiction. Under this limitation if the suit decided involved more than ten pounds sterling and the defeated litigant should be dissatisfied with the manner in which the judgment had been rendered, he possessed the right to make an appeal to the General Court; but if the sum fell below that amount the judgment was to be conclusive. They were, first, to enforce the acts for the preservation of good government, and to punish everyone guilty of violating them; secondly, to arrest all persons who threatened or actually assaulted any of the King's subjects; thirdly, to impanel juries who were to inquire into all

2. Henning's Statutes, Vol. I, 66. 3. Henning's Stats., Vol. I, 132.

manner of felonies, witchcraft, extortions and the like; fourthly, to examine witnesses, take depositions and decide suits between party litigants; fifthly, to carry out all orders of the General Court and proclamations of the Governor and Council, and to punish anyone who disregarded them; and finally, to require their clerk to make a permanent record in all matters of general controversy already determined.[4] In a general way, the County Court's jurisdiction resembled the combined jurisdictions of the principal courts of England, viz: the Chancery, King's Bench, Common Pleas, Exchequer, Admiralty, and Ecclesiastical. The readiness of their response to every appeal made to them by the poor was one of the most remarkable and commendable of their many characteristics as a judicial body.

This court also sat as a Court of Probate, and the act of Assembly of 1645 provided that letters of administration should be granted by this court. Wills, however, had been approved in the County Courts prior to this act, as also had been the probating of wills by the General Court alone. One of the County Court's most original features was that it was a court of record for all kinds of land conveyances. All conveyances of real estate were required to be recorded at the county seat of each of the counties or shires, as a means of affording the people at large the fullest information as to the basis of title to all land situated in their respective counties. Mortgages were to be regarded as fraudulent unless they were recorded in the books of either the County, or General Court.

Bruce, after citing Henning, Vol. I, 303, states that by the terms of an act passed in 1645 either party to a suit in a county court, no matter how large or how small the sum or values involved might be, possessed the right to call for the settlement of the controversy by the verdict of a jury. If, before the case came to an actual hearing the defendant should demand relief in equity, the case was to be stayed until the issue of the appeal to the Chancery Division of the Court was known; and should that issue be unfavorable to the defendant's side, the trial by jury was to be begun and pressed to a conclusion. If, on the other hand, the issue was favorable the justices could enter a decree at once

4. Northampton County Records, 1689-98, p. 99.

and dismiss the jury.[5] It would appear that, even after the jury had delivered its verdict, an appeal could be made to the Chancery side of the Court. The General Court, which at the present time is the Supreme Court of Appeals of Virginia, was the first and highest tribunal for the administration of justice established by the English inhabitants of North America. Its preëminence, therefore, is increased by the fact that its membership, then as now, was composed of men who were the foremost of their times in ability, character, social rank, political standing and influence among their fellow citizens. Bruce states that the history of this court can be appropriately divided into two distinct periods: first, its history previous to 1619, when the Colony was held under established rule and was in an unsettled condition which extended its influence to the action of the court; and second, its history after 1619, when the colony had become a self-governing community and its affairs were regulated by its own acts of Assembly and the laws of England, a fact that in its turn also reflected in the action of the court. During the first period the jurisdiction of the General Court was entirely original; during the second it was original and appellate. "When the government was first organized for Virginia, the President and Council were invested with judicial as well as with political powers. They were particularly authorized to punish with death all persons convicted of rebellion, conspiracy, mutiny, sedition, murder, manslaughter, rape and adultery, but the grounds of the original accusation first had to be investigated by twelve impartial, sworn jurymen. There are numerous instances of the exercise of these judicial powers in criminal cases at the very threshold of the Colony's history."[6]

Its sessions were usually held at Jamestown, the capital of the Colony, but it occasionally met elsewhere, notably at Williamsburg. Its terms ordinarily continued through a single week, and its members consisted of the Governor and the entire body of men belonging to his Council. At first, three composed a quorum, which was subsequently increased to five, and in 1631 a fine of forty shillings was levied against every member who failed to attend the session of the Court unless reasonable excuses were

5. Henning's Stats., Vol. I, 300.
6. Bruce's History, Vol. I, 647.

shown. However, it nowhere appears that any of the judges was ever fined for the neglect of duty.

As we have already stated, the jurisdiction of the General Court was both original and appellate, and its most important feature was its exclusive right to try all criminal cases for loss of life and limb. An early statute required that every criminal should be tried in the county wherein the offense was committed. In a very few years, however, this law, which was adopted for the immediate relief of the people, was repealed and the General Court was thereafter given exclusive jurisdiction of all extreme cases of crime.

An appeal to this tribunal from the County Courts was allowable when it was clearly shown that an unjust decision had been rendered and public justice had miscarried. However, by an act of the Assembly adopted in 1647, no appeal was allowable in civil cases unless the sum in dispute was equal in value to sixteen hundred pounds of tobacco, or its equivalent, which, at that time, was ten pounds sterling. In 1659 this limitation was removed in all the counties except Northampton, and at the same time it was provided that in case the appeal was overruled by the high court the appellant was required, in addition to the cost of the appeal, to pay to the appellee a sum in the way of damages equal to one-half of the amount in controversy. The act of 1661 removed the restriction on the right to appeal when a small amount or an object of small value was involved, on the ground that there "might be as great error in judgment of matters of small value as of the greatest." The appellant in such a case, however, was still required to give security that he would prosecute the cause; and also that, if cast in the suit in the General Court, he would, in the form of damages alone, pay the appellee fifty per cent of the sum in dispute.[7] A few years afterwards it was decided that an unconditional appeal would be allowed only in those cases involving values exceeding sixteen hundred pounds of tobacco, or ten pounds sterling.[8]

The principal officers of the Appellate Court were its clerk and Attorney-General. The latter was the chief legal adviser of the

7. Henning's Stats., Vol. II, 65.
8. Bruce's History, Vol. I, 683, 685.

Governor and Council as well as the highest public prosecutor for the Crown in the Colony. His salary was twenty pounds sterling annually, in addition to the fees required to be paid to him by the litigants in appeal cases.

Under an act of the General Assembly adopted in 1642, an appeal might be taken to the General Assembly from the County Courts, and also from the General Court, should it be clearly shown that the Court in trying the same had failed to promote equity, or in cases where the Governor had sat as a judge on the circuit.[9] There, however, was seemingly no inhibition on the right of any citizen to appeal to the General Assembly touching any matter involving a general right. But later on this right was taken away by the action of the English Government, and the Burgesses never fully reconciled themselves to the change because they regarded it as an encroachment upon their rights as members of the legislative body of the Crown in the Colony.

Bruce, in his history of the Seventeenth Century, in discussing the Admiralty and Chancery Courts, says that "during the greater part of the seventeenth century, all cases involving questions of admiralty were tried not by a single court which possessed the exclusive right of inquiry in that field, but by both the County Court and the General Court. It would appear that the latter, in conformity with the character of its most important original jurisdiction, decided all admiralty causes in which the punishment to be inflicted consisted of the loss of life or limb. Such causes were principally those in which persons were brought up before it for having committed murder or a like offense on the high seas." Governor Berkeley in 1671 declared that there was no need of an admiralty court "since not a single prize in the course of twenty-eight years had been brought into the waters of the Colony." [10] But in 1697 such a court was established in the Colony as a permanent part of its judicial system. Its officers consisted of judge, register, marshal, and advocate, who, upon the recommendation of the Governor, were appointed by the Lord High Admiral of England. All of these officers were men of high standing and were citizens of the Colony.

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9. Henning's Stats., Vol. I, 345.
10. Bruce's History, Vol. I, 696.

The jurisdiction of this court "embraced not only all cases of piracy, privateering, and violations of the navigation acts, but also all cases of unlawful conduct on the collectors' part in performing their duties; or of unlawful conduct which these collectors had detected on the part of other persons in relation to the taxes on exports. It also determined all controversies arising between master and mariner, whatever might be the subject of the dispute."

The only other court created in Virginia during the seventeenth century, was the court of Chancery, which, owing to the usurpations of its High Chancellor (Governor Howard) had existed only a short time and played but a small part in the judicial history of the period of its existence, when it was abolished by the General Assembly.

At various times it was suggested that a separate Court of Exchequer should be established in the Colony; but inasmuch as the duties of such a tribunal were fully embraced in the jurisdiction of the General Court it was never created.

In the History of North America, published by Barrie at Philadelphia, Vol. 3, p. 90, speaking of the Virginia courts, he says the Spanish Ambassador, Gondomar, warned James II, that the Virginia courts were a "seminary for a seditious parliament."

From the foregoing statements it appears that Virginia is the mother of the Common Law Practice and Procedure in the New World, from which has spread into the different States of the Republic—except Louisiana—the *Lex Non Scripta,* which, in a restricted form, in conjunction with State statutory enactments, will ever remain the law for the government of the various Commonwealths of our common country. From Magna Carta to the present time, the methods of enacting law and the succession of great exponents and expounders of the law are established and well known: Glanvill in the twelfth century and Bracton in the thirteenth were followed by Littleton in the fifteenth, by Coke in the seventeenth, by Blackstone in the eighteenth and by Kent in the nineteenth century.

The first Constitution of Virginia was adopted in May, 1776, and from that time the powers of the Convention ceased. Patrick Henry was elected the first Governor of the State June 29,

of that year—the same day the Constitution was adopted. He was succeeded in 1779 by Thomas Jefferson, who resigned in June, 1781, and was succeeded by Thomas Nelson, Junior, who resigned the same year, and was succeeded by Benjamin Harrison, who continued in office until November 29, 1784, when Patrick Henry was again elected Chief Executive of the State. The Colonial Courts were thereafter continued, although changes, from time to time, were made by Constitutional Conventions, and by legislative enactments, yet, for a long period of time, the English system was not materially altered. The Convention of 1849 required members of the County Court to be chosen by popular election, and the Convention of 1869 changed the system so the court ceased to be held by Justices of the Peace, and in all of the counties, the court was presided over by a County Judge, who was chosen from the legal profession. This tribunal, therefore, for more than two centuries was a peculiar feature in the distribution of the judicial power in Virginia; and until 1870 it maintained a prominent place in the domestic polity of the Commonwealth.

From 1776 down to 1831, the administration of the jurisdictions of law and equity were wholly separate in Virginia, except in the County and Corporation Courts; the tribunals with that exception being as entirely distinct as they were in England. In these two courts, which were at once courts of law and equity, yet the two jurisdictions were by no means blended, nor in any wise confounded. At first, in the imitation of the English system, there existed but one Superior Court of Chancery in the State, which held its sessions in Richmond, and was known at the High Court of Chancery. In 1802, the State was divided into three districts, and a chancery court was provided for each district to hold sessions at Richmond, Williamsburg and Staunton. Subsequently, the number was increased to nine, and courts were held, in addition to the three places above designated, at Norfolk, Fredericksburg, Lynchburg, Wytheville, Winchester, and Clarksburg. Later on, Lewisburg was added to the list. This system continued until 1831, when it yielded to that which has ever since been in force.[11]

11. Minor's Institutes, Vol. IV, 3rd Ed., 271.

In 1809, Superior Courts of Law were held by a single judge twice a year, in every county and corporation; and in 1831, this system was followed substantially by the present organization, which commits common law and equity jurisdictions to the same judge, just as has long been practiced in the County and Corporation Courts, keeping separate jurisdictions, however, as distinct as if they had been administered by different judges. These courts were required to be held twice a year in every individual county and corporation. In 1851, the name, but not the jurisdictions of these courts, was changed to Circuit Courts, and as such they are now held throughout the State.

Under the Constitution of 1904, the following courts only are now in existence, viz:

Magistrate Courts, with jurisdiction in all misdemeanors, with right of appeal to the Circuit Courts, and civil jurisdiction up to $100, with similar right of appeal. Recently the Legislature has increased the jurisdiction to $300.

Circuit Courts, which have general jurisdiction in all civil and criminal matters, law and equity, and which are held for the various counties in the State by a judge elected by the Legislature. There are now 31 circuit courts in the Commonwealth.

Corporation Courts, which have the same jurisdiction as the circuit courts, except they are confined to the larger cities. There are, at this time, 18 such courts in Virginia.

The cities of Norfolk, Richmond and Roanoke each has a Court of Chancery, presided over by a judge elected, as all other judges are in the State, by the Legislature. And finally, the court of last resort—the Supreme Court of Appeals, of five judges, which, as its name implies, has state-wide jurisdiction over all appeal cases.

When West Virginia became a separate State in 1863, the judicial and legal system of Virginia was practically adopted by the new State, except the County Court for the trial of civil and criminal causes, which tribunal gave way to township Boards of Supervisors whose jurisdiction was limited solely to the management of the fiscal affairs of the different counties; but under the Constitution of 1872, the Supervisor system was changed back to the old plan of County Courts, which are still in vogue.

These courts, however, are limited in their jurisdiction to the appointment of administrators and executors, the probating of wills, the recording of deeds, etc., and the management of the fiscal affairs of the various counties. In some of the counties, however, county business is controlled by Boards of Commissioners, and not by County Courts, but they are in no case substituted for the County Courts, except in name and in the manner above stated. We still retain the office of Justice of the Peace, who has jurisdiction in criminal procedure, and also in civil causes in amounts not exceeding $300, with the right of appeal to the Intermediate and Circuit Courts. We have Circuit Courts throughout the State with identically the same jurisdiction as those in Virginia. In a few of the counties, Criminal Courts have been created by the Legislature to hear and dispose of criminal cases only. In Kanawha and Marion Counties Intermediate Courts were established to relieve the Circuit Courts of those counties from the congestion brought about mainly by the numerous appeals to them from Magisterial Courts. In 1914, the Common Pleas Court of Kanawha County was created by an act of the Legislature, whose jurisdiction is concurrent with the Circuit Court of that County. And finally, West Virginia, the same as the Mother State, has its Supreme Court of Appeals composed of five judges, although there were only three when the State was created, which number was increased to four by the Constitution of 1872. The amendment providing for a fifth judge was adopted in 1902. As its name implies, this court is the final arbiter in both law and equity, in all appeals from the Circuit Courts.

We have, therefore, in Virginia and West Virginia today practically the same system of jurisprudence that was in existence three hundred years ago. Whilst law is now a more exact science than it was in the seventeenth century, yet its basic principles, now as then; are the same, and will doubtless so continue to be through the coming centuries.

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